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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES W. McCORD, JR.,

Petitioner,

v.

F. LEE BAILEY,
GERALD ALCH,
BAILEY, ALCH AND GILLIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED FOR REVIEW

1. May collateral estoppel be invoked against a party who has never litigated the precluded issue in any forum?

2. Is the standard for determining legal malpractice in criminal cases the same as, and no less exacting than, the test for constitutionally-required "effective assistance of counsel"?

3. Is a verdict and judgment of guilty in a criminal case an absolute bar to claims for injury, negligent or deliberate, otherwise assertible against the convicted defendant's counsel; is it true, thus, that only acquitted defendants have protection against the indifference, incompetence or treachery of their counsel; and is conviction the only cognizable injury sufferable by accused wrongdoers caught up in the administration of criminal justice?

4. Is the practice of forcing civil-case plaintiffs arbitrarily to "rest" by cutting off discovery with no relation to trial schedules a misapplication of the Federal Rules?

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Respondents.[1]

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS DELIVERED BELOW

The opinion for which review is sought here is the opinion of the United States Court of Appeals for the District of Columbia Circuit in *McCord v. Bailey et al.*, Case No. 79-1085, decided (with a partial dissent) on September 9, 1980. This opinion has not yet been reported, but is set forth in the attached Appendix (App.) A at page 1a. The opinion of the United States District Court for the

[1]Caption lists all parties.

District of Columbia in the same case (C.A. No. 74-188, filed May 19, 1978), also not yet reported, is set forth at App. P n. 1b.

JURISDICTIONAL STATEMENT

A timely petition for rehearing filed in the Court of Appeals in this case was denied on October 15, 1980. The instant petition for certiorari is authorized to be filed within ninety days thereafter by §2101(c) of Title 18, U.S.C. Jurisdiction in this Court grounds on §1254 of Title 18; jurisdiction in the Court of Appeals was conferred by §1291.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Petitioner's arguments against the majority opinion of the Court of Appeals in this case include a contention that it conflicts with the Seventh Amendment ("In Suits at common law, where the value in currency shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."), and with Rule 38(a), Federal Rules of Civil Procedure ("The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate").

STATEMENT OF THE CASE

Petitioner McCord is the ex-CIA wiretap expert arrested in the premises of the Democratic National Committee in

the notorious Watergate case. Soon suspecting he was being made a scapegoat, McCord went to Boston and retained F. Lee Bailey, Bailey's associate Gerald Alch, and their partnership, Bailey, Alch and Gillis, in order to have vigorous, competent and independent defense counsel.[2] After his conviction in a trial wherein he was counselled not to testify, prejudiced by give-away concessions to the prosecution, subjected to perjured testimony, and provided with only a fatuous "Patty Hearst" (duress) defense theory, he became suspicious that Bailey and Alch had been serving the cover-up conspiracy, aimed at silencing him and his codefendants and engineering his conviction, instead of fulfilling their professional obligations to him.

There is little doubt that such was the case. Though "stonewalled" and crippled in his discovery efforts, McCord has established clear ties between his attorneys and the great Watergate conspiracy so dramatically exposed in *United States v. Haldeman et al.*, 559 F.2d 31 (D.C.Cir., *en banc*, 1977), *cert. den.* 429 U.S. 1120, e.g., Alch was a direct intermediary in efforts to bribe McCord to remain silent; Alch tried to force a red-herring "CIA defense" on McCord; Bailey (himself then the subject of an investigation that resulted in a federal indictment naming him) secretly assured conspirator John Mitchell that McCord would not be allowed to name him (Mitchell), and secretly reported McCord's decision not to testify to the latter; . . . . etc.

McCord has also established in the instant case, by uncontroverted affidavit-statements from emminent mem-

[2]Since his entire case was dismissed by judgment on the pleadings and summary judgment, App. B p. 1b, McCord is entitled to have well-pleaded allegations, and even his version of controverted facts, taken as true at this stage.

bers of the District of Columbia Bar, that Alch and Bailey's performance was below the standards of skill, diligence and integrity applied in the usual malpractice formula.

When new counsel entered the case for McCord, they moved for a writ of error *coram nobis* alleging, for the firs time, inadequate representation and disloyalty on the part of Alch and Bailey. This was summarily dismissed by the trial Court without an evidentiary hearing. On appeal to the Court of Appeals the charges against Alch and Bailey were made again, and again they were turned aside without a hearing:

> "As a preliminary matter, we have no quarrel with McCord's assertion that disloyalty or conflict of interest may, if substantial and proven, result in the denial of effective assistance of counsel in contravention of the Sixth Amendment. We have little experience with such claims and thus have not developed any detailed standards to judge their merit. However, accepting even the broadest view of disloyalty or conflict of interest, we do not find that McCord has alleged facts sufficient to justify either a new trial or a hearing on his allegations." *United States v. McCord,* 509 F.2d 334, 351-2 (D.C.Cir., *en banc,* 1974), *cert. den.* 421 U.S. 930.

In the instant civil action, filed pursuant to § § 1331, 1332 & 1343 of Title 28, U.S.C., McCord specified four counts, malpractice, malicious injury, conspiracy to injure, and deprivation of civil rights (under § § 1893 & 1895 of Title 42, U.S.C.), and recited a full list of consequent damages. Amended Complaint, App. C, p. 1c. After discovery was cut off, over his objection, the trial Court granted summary judgment against McCord on the ground that he was collaterally estopped as to all counts by the rejection of his charges in the prior criminal case, App. B, p. 1b. The Court

also held that McCord's complaint was dismissible because, thanks to his jury-verdict conviction, he could not under any circumstances show legal injury attributable to neglect or treachery by his defense counsel. App. B, p. 4b.

On appeal the Court of Appeals reversed and remanded because it concluded McCord had stated a cause of action under the Ku Klux Klan Act [§ 1985(2) of Title 42, U.S.C.]. App. A, p. 12a. But it affirmed the no-damage bar to most of McCord's case, App. A, p. 7a, and, with one Judge dissenting, the application of collateral estoppel, App. A. p. 2a. In reaching the latter conclusion the Court stated that "the legal standards for ineffective assistance of counsel in McCord's criminal proceeding and for legal malpractice in this action are equivalent." App. A, p. 4a.

ARGUMENT

I.

THE COURT OF APPEAL'S ENLARGEMENT OF COLLATERAL ESTOPPEL IN THIS CASE IS CONTRARY TO ALL PRIOR AUTHORITIES, INCLUDING RECENT RULINGS BY THIS COURT.

In *Allen v. McCurry,* No. 79-935 (decided December 9, 1980), this Court once again considered the collateral estoppel doctrine, in its application to a § 1983 case, and once again restated the cardinal requirement:

> ". . . one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair

> opportunity' to litigate that issue in the earlier case. *Montana v. United States,* 440 U.S. 147, at 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, at 328-329 (1971)." Slip Opinion, p. 5 [Citations amplified]

See also *Emich Motors Corp. v. General Motors Corp.,* 340 U.S. 559, 569 (1951).

It is noteworthy that this Court has recently even divided over the question whether full-dress litigation in an equity case could be relied upon as a basis for collateral estoppel in a jury-demand action on the law side—because of the Seventh Amendment. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). Surely there can be little question that here, with *no* hearing and *no* opportunity to litigate, the Seventh Amendment safeguard must be called into play to assure McCord his day in court, and his right to be heard by a jury. See also Rule 38(a), Federal Rules of Civil Procedure.

II.

THIS COURT SHOULD CLARIFY THE LEGAL MALPRACTICE STANDARD, THE "EFFECTIVE ASSISTANCE" TEST, AND THE RELATION BETWEEN THE TWO.

By equating the test for legal malpractice in criminal cases with the "effective assistance" standard under the Sixth Amendment, App. A, p. 4a, the Court of Appeals in the instant case has not only departed from its own most recent pronouncements on the latter, *United States v. De Coster,* 624 F.2d 196, 204-6 (D.C.Cir. 1979), it has also created an unfortunate nexus between two of the most confused and (by this Court) neglected areas in the administration of criminal

justice. McCord contends the Court of Appeals erred: even apart from the element of *willful* dereliction here,[3] the constitutional standard is (and should be) higher, far more flexible, and more subjective than the simple, classic and universally established tort-malpractice test, "exercising that degree of skill and learning normally applied by attorneys at law who practice in the [District of Columbia]".

But right or wrong, the instant opinion cannot fail to spread confusion and doubt among future defendants and litigants. This Court will sooner or later have to lay down authoritative guidelines in both fields, and McCord respectfully urges that that be done here, in his case.

III.

THE HOLDING THAT A CONVICTED DEFENDANT IS BARRED BY HIS CONVICTION FROM ANY RECOVERY FOR ANY DERELICTION BY HIS COUNSEL MUST BE OVERTURNED.

The trial Court and the Court of Appeals in this case have fashioned a remarkable total immunity[4] for defense lawyers from an old—and inappropriate—District of Columbia precedent, *Niosi v. Aiello,* 69 A.2d 57 (D.C. Mun. App. 1949). App. A, p. 8a. That case held, in a malpractice

[3]The Ninth Circuit, in a case which happens to involve one of the same defendants, has granted relief for disloyalty and conflict of interest that pales beside what McCord charges here. *United States v. Hearst,* No. 78-3612 (decided October 17, 1980), set forth herein at App. D., p. 1d.

[4]*See Neel v. Magana, Olney, Cathcart & Gelfand,* 491 P.2d 421, 429-30 (Cal. 1971).

action against an attorney for overlooking a statute of limitations in a civil action, that there could be no recovery because the barred suit could not have been brought anyway, for want of a proper party plaintiff.

Also, impliedly at least, the Court of Appeals denies relief to McCord because it is not persuaded, at this long remove, that a vigorous defense, and one or more of the neglected or suppressed defense theories, would necessarily have won him an acquittal.

The net effect of this is that no matter what their indifference, or even active treachery, defense lawyers may only be called to account by *acquitted* clients; and, conversely, reviewing courts are free to brand malpractice plaintiffs guilty and remediless as an incontestible matter of law. Both those propositions can only make mischief. In the development of standards and sanctions to deal with below-minimum criminal defense practitioners, it must be recognized that there are many points, from initial arrest to final parole or pardon application, where the conduct or misconduct of defense counsel can aid—*or injure*—even a guilty client.[5]

IV.

THIS CASE EXEMPLIFIES AN ABUSE OF THE FEDERAL RULES OF CIVIL PROCEDURE, PREJUDICING PLAINTIFFS IN DISCOVERY EFFORTS, WHICH SHOULD BE CURBED.

In the District of Columbia Circuit and elsewhere a practice has developed, mainly at the instigation of the defense bar, that handicaps and prejudices plaintiffs without

[5]See the discussion of *Cuyler v. Sullivan*, No. 78-1832 (decided May 12, 1980) at App. D, pp. 6-7d.

contributing anything towards the efficient administration of the civil courts—and which is inconsistent with both the letter and the spirit of the Federal Rules. That is the practice of fixing an arbitrary cut-off for discovery without any relation to trial schedules or trial dates.

McCord was victimized by this. Encountering unusual difficulties (most deponent-witnesses were busy lawyers, represented by busy lawyers; some were still in jeopardy or actually involved in civil and criminal proceedings; some "stonewalled" or kept retreating into the briarpatches of privilege and "work product"; and the trial Court ruled against him at nearly every turn), he was cut off arbitrarily before any trial date had been determined. In effect, this obliged him to "rest," as if he were carrying a burden of proof, and indeed the Court of Appeals notes, "the district court also found that McCord had failed to prove . . . etc." App. A, p. 7a.

The Federal Rules of Civil Procedure are intended to secure the just, speedy, and inexpensive determination of every action. Rule 1. Discovery may proceed in any sequence, and simultaneously by all parties. Rule 26(d). Motions for failure to state a claim on which relief can be granted, and for judgment on the pleadings, may be made within such time as not to delay the trial, Rule 12(b) & (c), and the latter may even be made at the trial. Rule 12(h)(2). And motions for summary judgment may be made "at any time" (more than 20 days after commencement of the action). Rule 56(a) & (b).

Rule 56 deals specifically with the situation wherein a party needs additional time (and discovery opportunity) to respond to a dispositive motion depending on facts:

> "(f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by

> affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Plainly, accordingly, the Rules were intended to allow all litigants to press discovery as far as they could, up to the time of trial. If plaintiffs are to be pressured or cut off, the only justifiable grounds for doing so is the availability of a trial date. Freezing plaintiffs' cases earlier, to advantage defendants in making dispositive motions, is unfair, unrelated to any legitimate administrative purpose, and at variance with the Rules.

Respectfully submitted,

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January 12, 1981

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1085

JAMES W. MCCORD, JR., APPELLANT

v.

F. LEE BAILEY, ET AL.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 74-1888)

Argued October 17, 1979

Judgment entered
this date

Decided September 9, 1980

Rufus King, Sr., with whom *Rufus King, III* was on the brief, for appellant.

Barry E. Cohen, with whom *Roger E. Zuckerman*, *Roger C. Spaeder*, *Richard A. Stanley*, and *Wendy Manz*, were on the brief, for appellees.

Before TAMM * and WALD, *Circuit Judges*, and PHILIP NICHOLS, JR.,** *Judge*, United States Court of Claims.

Opinion for the court filed by *Circuit Judge* TAMM.

Opinion filed by *Circuit Judge* WALD, concurring in part and dissenting in part.

TAMM, *Circuit Judge*: With this action we are called upon to review yet another canto in the seemingly ceaseless saga of Watergate. Plaintiff James McCord, Jr., sued his criminal trial attorneys, defendants F. Lee Bailey, Gerald Alch, and the firm of Bailey, Alch & Gillis, for malpractice, conspiracy to represent incompetently, and conspiracy to deprive civil rights. The district court granted defendants' motion for summary judgment. McCord appeals. We agree with the district court that either collateral estoppel or McCord's failure to show that he has suffered any legally cognizable injury precludes McCord's malpractice action; we also believe, however, that McCord may have a colorable claim under the first clause of 42 U.S.C. § 1985(2) (Supp. II 1978). We therefore reverse the decision of the district court and remand the case for further proceedings not inconsistent with this opinion.

I

In June of 1972, Washington's Metropolitan Police arrested McCord with four others at the Democratic National Committee headquarters. McCord was tried in federal district court, and eventually convicted of burglary, possession of intercepting devices, interception of oral and wire communications, and conspiracy to commit

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* Circuit Judge Leventhal, who was a member of this panel when the case was heard, died before the panel had agreed on a disposition. Circuit Judge Tamm was drawn by lot to replace Judge Leventhal in the consideration of this appeal.

** Sitting by designation pursuant to 28 U.S.C. § 293(a) (1976).

these offenses. McCord then petitioned the trial court for relief in the nature of a writ of error coram nobis, raising in part allegations of ineffective counsel at the criminal proceedings. McCord claimed that his attorneys had been disloyal because they discussed his case with attorneys for the other defendants and with some of McCord's co-conspirators, because they failed to cross-examine key government witnesses with sufficient vigor, and because they did not raise a defense of official authorization for McCord's acts. The district court denied McCord's petition in late 1973. McCord appealed this decision and his conviction the following year, repeating his claim of ineffective assistance of counsel as one ground for reversal. This circuit, sitting en banc, discussed these contentions in detail, found them meritless, and affirmed the conviction. *See United States v. McCord*, 509 F.2d 334, 343-45, 351-53 (D.C. Cir. 1974) (en banc), *cert. denied*, 421 U.S. 930 (1975).

In August of 1975, McCord sued his criminal trial attorneys on four counts: negligent and careless representation, intentionally incompetent representation, conspiracy to represent incompetently, and conspiracy to deny McCord his constitutional and statutory rights. After more than two years of extensive discovery, the defendants moved for summary judgment. The district court granted this motion, finding that collateral estoppel barred plaintiff's claims, or alternatively, that plaintiff lacked a legal injury for which relief could be granted. Plaintiff McCord appeals that judgment.

II

Collateral estoppel "prohibits parties who have litigated one cause of action from relitigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation." *Tutt v. Doby*, 459 F.2d 1195, 1197 (D.C. Cir.

1972). *See Nasem v. Brown*, 595 F.2d 801, 805 (D.C. Cir. 1979); RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, April 15, 1977). Like res judicata, collateral estoppel promotes judicial efficiency. As the Supreme Court has noted,

> a party who has had one fair and full opportunity to prove a claim and has failed in that effort should not be permitted to go to trial on the merits of that claim a second time. Both orderliness and reasonable time saving in judicial administration require that this be so unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.

Blonde Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 324-25 (1971) (quoting *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir.), *cert. denied*, 340 U.S. 865 (1950)). For this doctrine to apply, the same issue must be at stake in both cases, and the issue must have been litigated and decided in the first suit.[1]

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[1] Because it is the defendants who raise collateral estoppel to bar the plaintiff's relitigation of the malpractice issues, we need not be concerned that the defendants were neither parties nor privies to the criminal trial or appeal. In Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29 (1971), the Court held that "defensive use" of a prior judgment—that is, a defendant's assertion of collateral estoppel to prevent a plaintiff's litigation of issues the plaintiff previously litigated and lost—was permissible even though the defendant was not himself bound by the prior judgment. Last year the Court reaffirmed this rule. *See* Parklane Hosiery v. Shore, 439 U.S. 322 (1979). Distinguishing defensive use from offensive use (a *plaintiff's* assertion of collateral estoppel to prevent a *defendant's* litigation of issues the defendant previously litigated and lost), the *Parklane* Court observed that even if the defendant was not himself subject to an estoppel arising from the prior judgment he asserts against the plaintiff, defensive use promotes judicial economy without being unfair. *See id.* at 329-31.

McCord's allegations in this case encompass in all material respects the same claims he presented in his coram nobis petition and his criminal conviction appeal. These claims center on ineffective assistance and intentional betrayal. Though in his civil case he couches his claims primarily in tort, he raises no new material contentions.[2]

Furthermore, the legal standards for ineffective assistance of counsel in McCord's criminal proceedings and for legal malpractice in this action are equivalent. At the time of McCord's criminal appeal, this court defined ineffective assistance of counsel as the denial of a defendant's entitlement "to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." *United States v. DeCoster (DeCoster I)*, 487 F.2d 1197, 1202 (D.C. Cir. 1973). The concept of reasonable competence is also the standard "traditionally and universally employed as the measure of the lawyer's civil liability . . . ." *United States v. DeCoster (DeCoster III)*, No. 72-1283, slip op. at 10 (D.C. Cir. July 10, 1979) (Robinson, J., concurring), *cert. denied*, 100 S. Ct. 302 (1979). *See Marzullo v. Maryland*, 561 F.2d 540, 544 & n.9 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 495-96

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[2] When asked during oral argument to identify any issues of fact concerning his defense attorney's performance that had not been raised during the criminal proceedings, McCord's counsel responded only: "The overlooking, and we maintain and there's evidence, the intentional suppressing of that [official authorization] defense as a defense for McCord in the trial of the case." This issue was in fact argued in the coram nobis proceeding, *see, e.g.*, Supplemental Memorandum of the United States in Opposition to Motion by Defendant McCord in the Nature of a Writ of Coram Nobis at 4 & n.5, United States v. McCord, Crim. No. 1827-72 (D.D.C. Sept. 18, 1973), and in the criminal appeal, *see* United States v. McCord, 509 F.2d 334, 353 n.69 (D.C. Cir. 1974) (en banc), *cert. denied*, 421 U.S. 930 (1975).

(1976). *See also McMann v. Richardson*, 397 U.S. 759, 771 (1970); RESTATEMENT (SECOND) OF TORTS § 299A (1965); Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 937 (1973).

Given the similarity of both the facts in issue in this case and the applicable legal standards, estoppel may be considered if these issues were actually litigated in McCord's criminal proceedings.[3] McCord asserts that they were not. He claims that a proper evidentiary hearing did not take place during consideration of the coram nobis petition or on appeal, thus denying him the opportunity to develop the facts of his case fully. We disagree.

A hearing need not be held for collateral estoppel to apply. When the facts are undisputed or accepted as true, a hearing would serve no purpose. Disposition by summary judgment will suffice, for example, because "there is no issue of material fact and . . . the moving party is entitled to a judgment as a matter of law," FED. R. CIV. P. 56(c). *See Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 110, 115-16 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976). In McCord's criminal appeal we accepted all of McCord's factual assertions as true, but still rejected his contentions. *See United States v. McCord*, 509 F.2d 334, 352

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[3] McCord does not contest that litigation of an issue in a criminal proceeding can estop a party from raising the same claim in a subsequent civil action. *See* Emich Motor Corp. v. General Motors Corp., 340 U.S. 558, 568-69 (1951); McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976). This "rule is not changed by the fact that the [civil] action is brought by the person convicted in the prior criminal action . . . ." Willard v. United States, 422 F.2d 810, 812 (5th Cir.), *cert. denied*, 398 U.S. 913 (1970). *See* Cardillo v. Zyla, 486 F.2d 473 (1st Cir. 1973); United States v. Lima, No. 79-502, slip op. at 4 (D.C. App. Mar. 12, 1980); Ross v. Lawson, 395 A.2d 54 (D.C. 1978).

nn. 65-66 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975). Having accepted McCord's factual assertions, a hearing now would amount to little more than a "useless ritual." *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d at 115.

Estoppel is not inappropriate because a contested issue is first raised after trial. McCord first asserted his ineffective assistance of counsel claim in his motion for a writ of error coram nobis. *See* Supplemental Memorandum on Points and Authorities in Support of Motion in the Nature of a Writ of Error Coram Nobis at 2, *United States v. McCord*, Crim. No. 1827-72 (D.D.C. Aug. 9, 1973).[4] Judge Sirica denied the motion after considering the parties' memoranda and arguments. *United States v. McCord*, Crim. No. 1827-72 (D.D.C. Nov. 7, 1973) (order denying writ of error coram nobis). On appeal, the parties fully briefed the issue, and it received a full discussion from this court. *See United States v. McCord*, 509 F.2d at 351-53. Thus McCord has already litigated the issue twice and lost, *see Rosenberg v. Martin*, 478 F.2d 520, 565 (2d Cir.), *cert. denied*, 414 U.S. 817 (1973), making defensive invocation of collateral estoppel appropriate, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-31 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971).[5]

Moreover, the circumstances of this case particularly favor invocation of collateral estoppel. McCord had every incentive in his criminal proceedings to argue aggressively for his claim of ineffective assistance of counsel. As noted above, he had a full and fair opportunity to prove

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[4] The court in *McCord* apparently believed the issue had not been raised before the district court. *See* United States v. McCord, 509 F.2d at 351 n.61.

[5] *See* note 1 *supra*.

his case. Precluding reconsideration of a litigated claim saves valuable judicial time and resources, while reaffirming the certainty and stability of judicial decisions. *See Johnson v. United States*, 576 F.2d 606, 609-19 (5th Cir. 1978). Furthermore, estoppel saves Bailey, Alch, and their former law firm from the burden of defending a lawsuit on an issue that has already been fully adjudicated. *See Parklane Hosiery v. Shore*, 439 U.S. at 326-27; *Tutt v. Doby*, 459 F.2d 1195, 1199 (D.C. Cir. 1972).

In sum, plaintiff McCord seeks to relitigate issues concerning the quality of his criminal trial counsel that he raised in the course of the criminal proceedings. Having twice raised these issues and lost, McCord cannot raise the claims anew in a civil case.

III

The district court also found that McCord had failed to prove that defendants' alleged misdeeds caused him any actual injury. McCord's only claim of loss from his counsel's negligence, however, is McCord's belief that Alch failed to assert defenses that would have exonerated him. We agree with the district court that this claim is not sufficient to support a suit for legal malpractice.

As a plaintiff in a malpractice suit,[6] McCord must demonstrate that the defendants' actions caused a legally

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[6] Count 3 of plaintiff's amended complaint alleges that the defendants took part in a conspiracy to deprive McCord of proper representation. However, civil conspiracy is not in and of itself a civil wrong, giving an independent cause of action. Lamont v. Haig, 590 F.2d 1124, 1136 n.73 (D.C. Cir. 1978). *See* Edwards v. James Stewart & Co., 160 F.2d 935, 936-37 (D.C. Cir. 1947); Blankenship v. Boyle, 329 F. Supp. 1089, 1099 (D.D.C. 1971). *But see also* Note, *Civil Conspiracy: A Substantive Tort?*, 59 BOST. U.L. REV. 921, 926 (1979) (separate cause of action for civil conspiracy permitted in a few jurisdictions under limited circumstances).

We have studied plaintiff's complaint closely, but we are unable to discern that he pleads or intimates any cause of

cognizable injury. *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1136-37 (D.C. Cir. 1969); *Richardson v. Gregory*, 281 F.2d 626, 629 (D.C. Cir. 1960). The plaintiff must show, among other things, that his attorney's "negligence resulted in and was the proximate cause of loss to the client." *Niosi v. Aiello*, 69 A.2d 57, 60 (D.C. 1949). Thus an attorney is not liable for malpractice if his client has suffered no damages.

McCord's sole assertion of injury proximately caused by his counsels' malpractice is that Alch negligently failed to argue a defense of "official authorization" for the Watergate operation and thereby denied McCord a successful defense. McCord claims he participated in the break-in and bugging because he believed that the Attorney General of the United States had authorized and approved the activity and that in so doing the Attorney General had made lawful what would otherwise have been unlawful behavior. McCord further asserts that he told defendant Alch about his belief that he had been officially authorized, and that Alch either negligently or maliciously failed to present the defense to the court. Such a defense, McCord contends, could have led to his acquittal.

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action other than legal malpractice and deprival of civil rights. *Cf.* Fielding v. Brebbia, 399 F.2d 1003, 1004 (D.C. Cir. 1968) (complaint alleged attorney had committed a breach of fiduciary duty). We are not free to fabricate pleadings for either party. As McCord himself reminds us,

> [w]e must predicate our judgment upon the record as it comes to us, not upon some theoretical or philosophical idea of what the record might have been had the pleadings and the record in the trial court presented us with a wide latitude for study and a multiple selection of possible dispositions. Upon the present record we have more voice than power.

Brief for Appellant at 34 (quoting Pearson v. Dodd, 410 F.2d 701, 709 (D.C. Cir.) (Tamm, J., concurring), *cert. denied*, 395 U.S. 947 (1969)).

A division of this court has suggested by way of a per curiam reversal that a limited defense to a criminal charge exists for reasonable, good faith reliance on the apparent authority of a government official to authorize otherwise unlawful activity. *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) (per curiam). Writing in a separate opinion, Judge Wilkey stated that a defendant asserting this defense must "show that his reliance was *objectively reasonable* under the particular circumstances of his case." *Id.* at 949 (Wilkey, J.) (separate opinion) (original emphasis). Judge Merhige agreed that the defense was available "if, and only if, an individual (1) *reasonably, on the basis of an objective standard*, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration and/or enforcement responsibilities in the relevant legal field." *Id.* at 955 (Merhige, J.) (separate opinion) (emphasis added).[7]

Even if we assume that after *Barker* a criminal act will be excused if the defendant was misled by a government official into believing that the act was lawful, McCord cannot make a colorable argument under either Judge Wilkey's or Judge Merhige's formulation. Clearly McCord must show that he had *some* objective basis to believe the Watergate operation enjoyed official sanction. Such a showing is unimaginable. McCord's employer was not a government agency, but a political committee. McCord did not believe his supervisor, Gordon Liddy, was other than a private individual. McCord had no direct contact with any government official, nor did he have reason to believe Liddy functioned as an intermediary for anyone acting in an official capacity. McCord con-

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[7] Judge Leventhal dissented in *Barker* because he did not believe *any* mistake of law defense actually applied to the Watergate circumstances. *See* United States v. Barker, 546 F.2d 940, 957-73 (D.C. Cir. 1976) (Leventhal, J., dissenting).

ceded before the Senate Watergate Committee that his bugging and surveillance all concerned political activities and that McCord himself harbored suspicions that the operations were unrelated to national security or other legitimate government interest.[8] Thus to the extent there is an official authorization defense, it could not apply to McCord. *See Democratic National Committee v. McCord*, 416 F. Supp. 505, 508-09 (D.D.C. 1976). Accordingly, had Alch or Bailey raised the defense at McCord's trial, Judge Sirica would have stricken it on its face; there could have been no difference in the trial's outcome.

McCord has failed to indicate how he could successfully establish injury, an essential element of his claim, and the defendants were entitled to judgment as a matter of law on this issue. The district court did not err when it identified the absence of any legally cognizable harm as an alternative basis for granting summary judgment.

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[8] *See Hearings on Watergate and Related Activities Before the Senate Select Comm. on Presidential Campaign Activities*, 93d Cong., 1st Sess., pt. 1, at 166 (1973). Judge Bazelon, speaking for this circuit in affirming McCord's criminal conviction, concluded that

> [McCord's] testimony before the Watergate Committee and the newly discovered evidence discussed in the text both tend to support the conclusion that McCord at no time believed his authorization was based on considerations of the domestic security of the United States, *see* Hearings on Watergate and Related Activities Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess., pt. 1, at 127-28, 173-76, 203 (1973) . . .; Trial Tr. at 1031. In light of this factual confusion and the problematic legality of McCord's defense, we find no plain error in the failure to raise the defense *sua sponte*.

United States v. McCord, 509 F.2d 334, 343 n.18 (D.C. Cir. 1974) (en banc), *cert. denied*, 421 U.S. 940 (1975).

IV

In the fourth and final count of his amended complaint, plaintiff McCord asserts claims against the defendants under 42 U.S.C. §§ 1983, 1985(2), (3) (Supp. II 1978).[9]

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[9] Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983 (1976). In 1979, Congress expanded the coverage of § 1983 to include acts under color of District of Columbia law. Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979). This amendment has no bearing upon McCord's case, however, because McCord does not contend that any deprivation of his rights occurred after the effective date of the amendment, December 29, 1979. *See id.* § 3.

Section 1985, subsections (2) and (3), provides that:

> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . .; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> (3) [I]n any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

The district court did not discuss these allegations. Findings of fact and conclusions of law must be "sufficiently comprehensive and pertinent to the issues to provide a basis for decision." *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82, 84 (D.C. Cir. 1944). *See Kelly v. Everglades Drainage District*, 319 U.S. 415, 420-22 (1943) (per curiam). Although inadequate findings and conclusions may be remanded to the district court for supplementation, "we will not remand a case for more specific findings if doing so will consume precious time and judicial resources without serving any purpose." *LaSalle Extension University v. FTC*, No. 79-1270, slip op. at 7 (D.C. Cir. June 5, 1980) (per curiam). We therefore must examine each of McCord's civil rights contentions to determine whether further consideration by the district court is required.

A. *McCord's Causes of Action Under Sections 1983, 1985(3), and the Second Clause of 1985(2)*

To maintain a cause of action under section 1983, McCord must show that the defendants deprived him of his civil rights "under color of state law." *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971). On this record McCord could not make the required showing. The defendants appeared on McCord's behalf at his criminal trial. Lawyers may be officers of the court, but " 'they are not officers of the state within the meaning of [section 1983].' " *French v. Corrigan*, 432 F.2d 1211, 1215

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property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(2), (3) (Supp. II 1978).

Our discussion of injury, *see* part III *supra*, is not applicable here.

(7th Cir. 1970) (quoting *Jones v. Jones*, 410 F.2d 365, 366 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970)), *cert. denied*, 401 U.S. 915 (1971). *Accord*, *Brown v. Chaffee*, 612 F.2d 497, 501 (10th Cir. 1979). In their capacities as representatives of a client in court, private counsel do not act under color of state law. *Slavin v. Curry*, 574 F.2d 1256, 1265 (5th Cir. 1978); *Fine v. City of New York*, 529 F.2d 70, 74 (2d Cir. 1975).

McCord argues, however, that the defendants are subject to section 1983 by virtue of their alleged conspiracy with various federal officials. Even if McCord's factual allegations are correct, such a conspiracy fails to satisfy section 1983's requirements. As the Supreme Court stated in *District of Columbia v. Carter*, 409 U.S. 418 (1973), section 1983 "deals only with those deprivations of rights that are accomplished under the color of the law of 'any State or Territory.'" *Id.* at 424. Actions of federal officers are outside its proscriptions. *See id.* at 424-25.

McCord's claim under 42 U.S.C. § 1985(3) is equally without merit. In *Griffin v. Breckenridge*, 403 U.S. 88 (1970), the Court held that although section 1985 reaches private conspiracies as well as those involving state action, the language, legislative history, and constitutional basis of the statute indicate that a plaintiff under section 1985(3) must allege and prove "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102. *Accord*, *e.g.*, *Ellis v. Cassidy*, No. 79-4160, slip op. at 3850 (9th Cir. June 20, 1980). Plaintiff McCord cannot pretend that he was the object of civil rights deprivation because of his race or membership in some other class.

McCord also asserts that the defendants conspired with others to dissuade him from testifying in his own behalf the grand jury and at his trial, thereby giving rise to a cause of action under 42 U.S.C. § 1985(2).[10] The

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[10] *See* note 9 *supra*.

second half of section 1985(2) does not apply to McCord. Like section 1985(3), it specifies an intent to deny equal protection of the laws and draws its constitutional basis from section 5 of the fourteenth amendment, which gives Congress the power to legislate against obstructions of justice in a state. Such a construction avoids any question of Congress's authority to enact this provision. *See, e.g., Brawer v. Horowitz*, 535 F.2d 830, 839-40 (3d Cir. 1976).

B. *McCord's Cause of Action Under the First Clause of Section 1985(2)*

The requirement of discriminatory animus in actions under the first half of section 1985(2) presents a question of first impression in this circuit.[11] Like the Third Circuit, "[w]e approach the perfidious syntax of § 1985(2) with some reserve for . . . there is a dearth of authority to light our way." *Brawer v. Horowitz*, 535 F.2d at 837.

We begin with the language of the statute itself. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *Zerilli v. The Evening News Association*, No. 79-1298, slip op. at 6 (D.C. Cir. June 11, 1980). The first clause of section 1985(2) creates a cause of action

> [i]f two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and

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[11] Decisions in other circuits have reached differing conclusions. *Compare, e.g.*, Brawer v. Horowitz, 535 F.2d 830, 840 (3d Cir. 1976) (showing of discriminatory animus not required) *and* Kelly v. Foreman, 384 F. Supp. 1352, 1355 (S.D. Tex. 1974) (same) *with* Jones v. United States, 401 F. Supp. 168, 172-74 (E.D. Ark. 1975) (plaintiff must show class-based, invidiously discriminatory intent), *aff'd*, 536 F.2d 269, 271 (8th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

> truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . ;

42 U.S.C. § 1985(2) (Supp. II 1978). Thus the first clause, unlike its companion provisions, prohibits conspiracies to interfere with the integrity of the federal judicial system. It does not demand a denial of "equal protection of the laws," nor is an implication of such a requirement necessary to avoid constitutional shoals.[12]

According to the Supreme Court, the Reconstruction civil rights acts are to be "accord[ed] a sweep as broad as [their] language." *Jones v. Alfred H. Mayer*, 392 U.S. 409, 437 (1968) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)). *Accord, Griffen v. Breckenridge*, 403 U.S. 88, 97 (1971). Given the manifest meaning and the absence of reason for restrictive reading, we do not believe a class-based, invidiously discriminatory intent is an element of a cause of action under the first clause of section 1985(2). *See, e.g., Brawer v. Horowitz*, 535 F.2d at 840. Our instructions are clear: "Where the language is plain and admits of no more than one mean-

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[12] The constitutional basis for the first clause of § 1985(2) is Congress's plenary power over the federal courts. The Constitution grants Congress power "[t]o constitute Tribunals inferior to the supreme Court," U.S. CONST., art. I, § 8, cl. 8, and Congress enjoys wide latitude in effectuating its constitutional powers, *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Preserving the integrity of the federal judicial process clearly includes discouraging all conspiracies, whatever their motivation or target, that use threats, force, or intimidation to deter free, full, and truthful testimony. *See* Stern v. United States Gypsum, Inc., 547 F.2d 1329, 1341 n.19 (7th Cir.) (dictum), *cert. denied*, 434 U.S. 975 (1977); Brawer v. Horowitz, 535 F.2d at 840; Kelly v. Foreman, 384 F. Supp. at 1355. Congress lacked an equivalent authority over state courts, so the equal protection language in the second half of § 1985(2) was inserted to ground that portion of the statute on Congress's power under § 5 of the fourteenth amendment. *See* pages 18-22 *infra*.

ing the duty of interpretation does not arise and the rules which are to aid doubtful meanings needs no discussion." *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

Even if we were obligated to look beyond the face of the statute, as the defendants suggest, we would find that the legislative history supports our conclusion. Reinforcing the sanctity of the federal judicial process for *all* citizens was one objective Congress had in mind when it enacted the source of section 1985, the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, 17 Stat. 13. *See* pages 14-15 *infra*. Moreover, the draftsman of the original legislation added the "denial of equal protection of the laws" phrase to his bill solely to allay doubts about the section's constitutionality that were raised by the bill's opponents. Because the bill's friends and foes acknowledged the federal government's power to protect its own courts, this phrase was not attached to the language that is now the first clause of section 1985(2). *See* pages 15-18 *infra*.

Protection of civil rights was not the only reason for the enactment of the Ku Klux Klan Act of 1871. Restoration of civil authority, including restoration of the federal courts' ability to proceed without improper interference, was a major concern. The statute has its roots in the racial violence that erupted in the southern states at the end of the Civil War. The Ku Klux Klan had been organized in 1866. The subsequent five years had been marked by increasing numbers of attacks, often fatal, against blacks and Union sympathizers, including many federal officials. By 1871, the turbulence in the South had caused considerable consternation in Congress. On March 23, 1871, President Grant asked for legislation giving him additional authority to control the apparent chaos. Five days later, Representative Samuel Shellabarger of Ohio introduced a bill to meet the President's request. *See generally District of Columbia v. Carter*, 409 U.S. 418, 425-26 (1973).

Throughout the deliberations that followed in the House and Senate, a recurring theme was that the need to preserve orderly government mandated enactment of Representative Shellabarger's bill. President Grant's message had declared that "[a] condition of affairs now exists in some States of the Union rendering . . . the carrying of the mails and the collection of the revenue dangerous." CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871). Proponents of Shellabarger's bill repeatedly raised the specter of a renewed spirit of insurrection running rife in the South. Representative Buckley, for example, warned the House of Representatives that this spirit

> still defies the national authority, sets at naught the laws of the country, and tramples upon the natural and political rights of our fellow citizens. The United States mails are stopped; route agents are shot dead while assorting the mails, and others are driven from their routes.
>
> Your revenue officers are resisted and scourged and driven from their homes and families and out of the country. . . . In certain communities lawlessness is widespread and on the increase. Crimes are fearfully common. The value of human life is disregarded. Murderers go unpunished. . . . Terrorism reigns. The apprehension of violence prevents good men from arresting the evils they see.

Id. at app. 190. *See id.* at 519 (remarks of Rep. Shellabarger). Thus congressional concerns encompassed more than racial equality or personal rights. The operation of government, especially the federal government, was threatened. Civil survival was at stake. *See, e.g., id.* at 830 (remarks of Sen. Stewart). To prevent what appeared to be impending anarchy, Congress must have intended its measure to reach more than attacks on government operations to further racial or other invidious discrimination, at least to the extent the Constitution permitted Congress to act.

Indeed, the bill as originally proposed created a broad remedy to address Congress's broad concerns. Section 2 of the bill would have made it a federal felony to conspire with another to commit, among other crimes, perjury, subornation of perjury, or criminal obstruction of justice, regardless of whether the offense took place in the course of state or federal proceedings. *Id.* at 317 (remarks of Rep. Shellabarger).[13] Opponents of this version characterized the provision as an unconstitutional trampling upon state prerogatives. Representative Arthur of Kentucky complained that the section "absorbs the entire

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[13] In its original form, § 2 of Representative Shellabarger's bill provided that

> if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, *perjury, subornation of perjury, criminal obstruction of legal*[] *process* or resistance of officers in discharge of official duty, arson, or larceny, and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, and upon conviction thereof shall be liable to a penalty of not exceeding $10,000, or to imprisonment not exceeding ten years, or both, at the discretion of the court; provided, that if any party or parties to such conspiracy or combination shall, in furtherance of such common design, commit the crime of murder, such party or parties so guilty shall, upon conviction thereof, suffer death. . . .

CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871) (remarks of Rep. Shellabarger) (emphasis added). *See id.* at app. 188 (remarks of Rep. Willard).

jurisdiction of the States over their local and domestic affairs" and called it "a sweeping usurpation of universal criminal jurisdiction in the States." *Id.* at 366. Representative Whitthorne of Tennessee argued that the section effectively empowered Congress to oversee all of the states' functions. *Id.* at 337.

Representative Shellabarger amended his bill in response to these objections that Congress lacked constitutional authority to extend federal jurisdiction as proposed in section 2.[14] The new version stated with greater

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[14] The amendment, among other things, replaced § 2 of the bill with the following provision:

> SEC. 2. That if two or more persons within any State or Territory of the United States shall conspire . . . by force, intimidation, or threat to deter any witness in any court of the United States from testifying in any matter pending in such court fully, freely, and truthfully, or to injure any such witness in his person or property on account of his having so testified, or by force, intimidation, or threat to influence the verdict of any juror in any court of the United States, or to injure such person in his person or property on account of any verdict lawfully assented to by him, or shall conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, or to injure any person in his person or his property for lawfully enforcing the right of any person or class of persons to the equal protection of the laws, each and every person so offending shall be deemed guilty of a high crime . . . and if any one or more persons engaged in such conspiracy, such as is defined in the preceding section, shall do or cause to be done any act in furtherance of the object of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person

specificity the violations brought under federal jurisdiction. For offenses traditionally left to state jurisdiction, such as obstruction of justice in state courts, the purview of section 2 was limited to crimes committed with an intent to deprive equal protection of the laws; as a result, the revised section 2 confined the new federal cause of action to violations of an explicit federal interest. For offenses under federal jurisdiction regardless of the offender's intent, such as acts interfering with the operation of federal courts, no limitation was made.

The changes answered the objections of some members. For example, Representative Willard explained that he had believed the original bill "gave to the United States courts jurisdiction of every criminal offense that could be committed anywhere within the limits of the United States; that it practically abolished the criminal jurisdiction of the State, absorbing it all into the United States courts." *Id.* at app. 188. With the amendment's restriction of federal jurisdiction over state crimes to violations that were intended to deny equal protection of the laws, Representative Willard announced he would vote in favor of the measure. *See id.* (remarks of Rep. Willard). Even those who continued their opposition conceded that Congress could do as it wished to protect the federal judiciary. Senator Thurman told the Senate:

> I grant that as to those which are offenses against the United States they must be taken into the Federal courts; the State courts have no jurisdiction of them. For instance, to intimidate a witness so as to prevent his attending a Federal court, to tamper with a juror in a Federal court, are offenses, not

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so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages against any one or more of the persons engaged in such conspiracy. . . .

Id. at 477 (remarks of Rep. Shellabarger). *See* note 9 *supra*.

> against the State, but offenses against the jurisdiction of which must be given to the Federal courts . . . .

Id. at app. 220.

Thus for the purpose of defusing the objections that his bill asserted federal jurisdiction over state crimes in excess of Congress's constitutional powers, Representative Shellabarger added the requirement of an intent to deny equal protection of the laws. Inserting the equal protection language limited federal jurisdiction over state crimes to those offenses that also injured a federal interest grounded in the fourteenth amendment. No such limitations were required in the bill with regard to protection of the federal interest in its own judicial process. Federal jurisdiction in all cases of this nature, such as intimidation of a witness in a federal proceeding, was recognized by both the bill's supporters and its opponents. Neither injury to a federal interest nor federal authority to remedy that injury were in doubt. Consequently, in applying the portion of Shellabarger's revised section 2 that is now codified as the first clause of 42 U.S.C. § 1985(2), the legislative history does not support requiring proof of a racial or other class-based invidious discrimination.[15]

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[15] By the same token, the clause's requirement that the conspiracy consist of two or more persons "in any State or Territory" does not exclude conspiracies conducted in the District of Columbia. In District of Columbia v. Carter, 409 U.S. 418 (1971), the Court held that the words "State or Territory" as used in 42 U.S.C. § 1983 do not include the District. Nevertheless, the term "State or Territory" may have one meaning in § 1983 and another in § 1985(2). The *Carter* Court recognized that " '[w]here the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning may well vary to meet the purposes of the law. . . .' " 409 U.S. at 421 (quoting

V

We have concluded that either the application of collateral estoppel or the lack of any legally cognizable harm to the plaintiff precluded McCord's legal malpractice claims under counts one through three of his complaint. Due to the absence of state action and any intent on the defendants' part to inflict a class-based, invidious discrimination, McCord cannot maintain a cause of action under 42 U.S.C. §§ 1983, 1985(2) (cl. 2), and 1985(3). We hold that with respect to McCord's claim under the first clause of 42 U.S.C. § 1985(2), however, neither a showing of state action nor a showing of class-based, invidious discrimination is required. His claim therefore cannot be discarded because these factors are not present.

Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932)).

The first clause of § 1985(2) is readily distinguishable from § 1983. In § 1983, "State or Territory" defines whose officials will have liability. In *Carter*, the Court reasoned that Congress did not intend the provision to extend to District of Columbia officials because Congress already had plenary power over officers of the District, and Congress had ample opportunity to supervise those officials directly. In § 1985(2), however, "State or Territory" defines what conspiracies will be subject to the statute. We cannot presume Congress intended to attack conspiracies throughout the nation *except* for the District of Columbia. A rationale that would justify esablishing the District as a conspiracy enclave is difficult to conceive. Furthermore, Congress enacted § 1983 pursuant to its powers under the fourteenth amendment. The *Carter* Court concluded that the District's officers were not liable under § 1983 because the fourteenth amendment reaches only state action. This limitation does not apply where article I powers are employed, such as the enactment of the first clause of § 1985(2) to protect the federal judiciary. *See also* Hurd v. Hodge, 334 U.S. 24 (1948) ("State or Territory" includes the District of Columbia for purposes of § 1982 because the statute is based upon the thirteenth amendment and thus is not limited to state action).

On this record we cannot say that McCord's invocation of section 1985(2) is frivolous. The defendants contend that McCord did not allege with sufficient particularity the overt acts of a conspiracy and that McCord did not offer proof of having been threatened or intimidated not to testify before the grand jury or at his trial. These issues are principally factual; they are best resolved in the first instance by the court that has been most intimately connected with the record. The decision of the district court is therefore reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

WALD, *Circuit Judge, concurring in part, dissenting in part*: I concur in Parts I, III and IV of Judge Tamm's opinion for the court. I disagree only with footnote 6 and with the discussion in Part II of the applicability of the doctrine of collateral estoppel in the unusual circumstances of this case.

While I agree with Part III of the opinion, the impossibility of McCord's demonstrating injury only disposes of one potential cause of action based on the facts alleged in his complaint, that of malpractice based on negligence. I cannot concur in the conclusion expressed in the majority's footnote 6 that McCord's complaint is so limited. It does not require an indulgent reading of the complaint to draw from McCord's allegations something more than mere negligence, though much of the language is cast in that light. McCord specifically alleges that his lawyers "knowingly and intentionally failed . . . to inform [him] of pertinent facts and factors," "failed to pursue certain avenues of investigation of matters vital to [his] defense," and that "at all relevant times hereto, the interests of the Defendants were in unrevealed conflict with the interests of the Plaintiff [McCord]." Furthermore, in Count II, he charges that the acts arose out of a conspiracy with the chief Watergate co-conspirators. A claim of disloyalty or conflict of interest on the part of an attorney is an actionable tort, recognized in our Circuit,[1] and described in the RESTATEMENT (SECOND) OF

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[1] In Fielding v. Brebbia, 399 F.2d 1003 (D.C. Cir. 1968), the plaintiff sued his attorney for breach of the fiduciary relationship, alleging that the attorney had counseled him to resign his position as president of a corporation, in order to help another client replace him and take over the business. In spite of the fact that in its factual allegations supporting the claim the complaint was conclusory and vague in the extreme, this court held that its dismissal for failure to state a claim was improper, noting that "this jurisdiction has been outstandingly alert to the delicacy of the status of attorneys

TORTS § 874 as a "breach of fiduciary duty." McCord's allegations of disloyalty, if proved, constitute a legally cognizable "wrong" separate and apart from the adequacy of his representation at trial.[2]

Furthermore, I would conclude that an allegation of deliberate and willful disloyalty and conflict of interest states a claim without an allegation of actual damages; the cause of action vindicates a legal *wrong* rather than seeking to compensate injury.[3] Of course, even assuming

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who undertake to counsel a client." *Id.* at 1005. The court further justified its hesitancy to bar the plaintiff from his opportunity to prove his claim by noting that the confidential relationship "presents so many opportunities for the reaping of special benefits at the expense of the client by an attorney so disposed." *Id.*

[2] The right to the undivided loyalty of one's attorney is "absolute" in the sense that it does not depend on one's guilt or innocence. That duty of loyalty is a crucial factor in the success of our adversary system of justice. It is strongly stated in Ethical Consideration 5-1 of the ABA Code of Professional Responsibility:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Of particular relevance to this case is Disciplinary Rule 5-107(B):

> A lawyer shall not permit a person who . . . pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

[3] The Supreme Court has recently observed:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of

that on a generous reading McCord's complaint alleges a tort claim which is not predicated on harm, collateral estoppel would serve as a barrier, according to the majority's discussion of that doctrine in section II. I cannot agree with that conclusion, given the facts of this case.

The doctrine of collateral estoppel, reduced to its essence, provides that our judicial system will provide a party with only one "full and fair opportunity" to litigate an issue. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979).

I agree with the majority that it may be perfectly acceptable for a party to be held bound by a determination made in a prior criminal proceeding in which he or she was the defendant. And of course, the fact that an issue is settled in the course of a summary proceeding, without an evidentiary hearing, does not necessarily mean that estoppel cannot apply, so long as a final judgment was entered on the merits. Many cases recognize the collateral estoppel effect of a final judgment based on insufficiency of a complaint or on summary judgment.

Nevertheless, I have difficulty with holding McCord totally estopped from asserting all claims of disloyalty and conflict of interest under the circumstances of this

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> such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Carey v. Piphus, 435 U.S. 247, 266 (1978).

case. And I note other courts have had similar difficulties when faced with occasional unfair results which might be wrought by too broad an application of the doctrine of collateral estoppel. Some have gone so far as to describe the doctrine as dangerous, in that it could result in "utter disaster" as a result of a "trivial controversy," subjecting litigants to "extravagant hazards." *The Evergreens* v. *Nunan*, 141 F.2d 927, 929 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944) (Learned Hand, J.). Traditionally, courts relied on a variety of approaches to avoid the necessity of holding a litigant bound when to do so would be unfair or unwise under the circumstances.[4]

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[4] For example, some decisions define the "issue" determined in the prior proceeding very narrowly, and then conclude that the new issue is different, albeit only slightly. *See* Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Williams v. Liberty, 461 F.2d 325 (7th Cir. 1972). Other courts have held that if the prior determination decided more than was "necessary," the bar should not apply. Haize v. Hanover Ins. Co., 536 F.2d 576 (3d Cir. 1976). Still other courts have strictly applied the requirement that a question be "distinctly put in issue and directly determined," especially in cases involving prior criminal proceedings. Kauffman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970).

Any of these theories could support a refusal to conclude that McCord is collaterally barred here. The issue in our prior decision was, after all, whether the assistance provided by McCord's counsel was so ineffective as to impair his right to a fair trial. Here, on the other hand, the question is whether Bailey and Alch violated the fiduciary duty owed to their client; the effect of that alleged breach on McCord's conviction or on the fairness of his trial is no longer the issue. As the Seventh Circuit has noted, "[T]he standard of proof in a malpractice action might not be as strenuous as it is when questioning the constitutional adequacy of counsel." Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973). It could be argued that this court's conclusion on appeal that McCord's allegations "taken as true do not make a case for disloyalty or conflict of interest" was more broadly worded than it need have been to dispose of the case, since all the Court

These analyses led to a conclusion that collateral estoppel could *not* apply because its prerequisites had not been met. I do not believe that such a restrictive ruling is necessary here, however. A more straightforward and flexible analysis has recently been commended to us by the Supreme Court. *Parklane Hosiery, supra*, 439 U.S. 322, struck down the last vestiges of mutuality of estoppel, which had provided that neither party could use a prior judgment against the other party unless both parties were bound by the same judgment. The Court recognized, however, that as traditional restrictions on the use of collateral estoppel were eased, the possibility of unfairness increased. I would add that the possibility of the frustration of the important public benefit of having issues fully aired and finally decided also increases. The solution, declared the Court, was not to impose strict limitations on when collateral estoppel may apply, but to grant broad discretion to determine that it should *not* apply in a particular case. *Id.* at 331.

I therefore turn to the question of whether an unusual combination of circumstances in this case might justify providing James McCord with an opportunity to prove that he is entitled to recover damages for malpractice from his former attorneys. There are a variety of such circumstances in this case. First of all, there is the important factor that this case involves the sensitive yet critically important relationship between a criminal defendant and his attorneys. Ensuring the strictest integrity in discharging this trust is a matter of as much concern to this Court as it is to defendants. Furthermore, no finder of fact has ever considered the evidence, heard the testimony and cross-examination of witnesses, judged the credibility of witnesses, and concluded that

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needed to decide was whether McCord had alleged a "substantial" deprivation of his right to effective assistance of counsel, which in turn affected his right to a fair trial.

Gerald Alch and F. Lee Bailey were representing McCord with undivided loyalty and protecting his interests alone. In the interests of the courts' duty to supervise the practice of law in this jurisdiction, it would be wise that such a determination be made before this chapter of the Watergate conspiracy is finally closed.

Furthermore, one of the principal purposes of collateral estoppel, "to protect litigants from the burden of relitigating an identical issue with the same party," *Parklane Hosiery, supra,* at 326, is not a factor in this case. Alch and Bailey have never previously been party to any suit brought by McCord; calling them to answer in a judicial forum for the first time works no more of an injustice against them than a lawsuit may against any litigant.[5] Mutuality may not be a *requirement* of collateral estoppel any more, but lack of mutuality certainly eliminates much of the potential unfairness of deciding not to apply the doctrine.

When preventing unfairness to litigants is not a factor in deciding whether collateral estoppel should apply, we are left with the goal of conserving judicial resources. In such a case, the court's discretion to decide that the benefits of an evidentiary hearing to finally resolve this issue are greater than the detriment to its resources is appropriately broader. This case should not involve the "staggering expense and typical length" of a patent case, for example, where collateral estoppel is particularly valuable. *Id.* at 328-329 n.10.

Finally, and particularly noted by the Supreme Court in *Parklane Hosiery* as a factor to be considered in exercising discretion to decide whether collateral estoppel should apply, there were practical and procedural disad-

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[5] In fact, because of the Court's ruling on the civil rights issues in this case, the defendants will in fact be called to defend their conduct in this case.

vantages suffered by McCord in presenting his claims to this court before. He was "unable to engage in full-scale discovery or call witnesses," *id.* at 331, and indeed he alleges that some witnesses were unwilling to talk with him because they were still subject to criminal prosecution. He was also in the process of attempting to pursue his appeal with new counsel, allegedly with a notable lack of cooperation from Alch. All of these are factors which I believe should be considered before the district court decides to foreclose McCord's tort claims, though I would leave initial determination of the balance of equitable considerations to it.[6]

All of this is not to say, of course, that McCord has proved his case of disloyalty and breach of fiduciary duty, even under this limited rationale. Rather, he has presented a plausible sequence of events, supported at key points by uncontested facts and affidavits from third parties, which I believe would give rise to a cause of action for tortious breach of fiduciary duty. Since motive, state of mind and how much of what Alch did was done at McCord's bidding or with his knowledge are critical factors, summary judgment is inappropriate, so long as collateral estoppel does not raise an absolute bar, just as it would be, for instance, in an antitrust or race discrimination case in which the sequence of events alleged by the plaintiff could be either innocent behavior or carefully

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[6] *Parklane Hosiery* establishes that the applicability of the doctrine of collateral estoppel rests within the discretion of the court, taking into account the equitable considerations of a particular case. A reading of the district court's opinion in this case reveals that it believed dismissal to be mandated, once the prerequisites of collateral estoppel are established. This difference in approach would not require reversal if there were no unique equitable considerations involved in this case, but there are very unusual circumstances involved here which I believe should be considered before further judicial exploration of McCord's claims is foreclosed.

disguised misconduct. Summary judgment should be used sparingly when motive and intent play a leading role, when proof is likely to be largely in the hands of alleged conspirators, and when a plaintiff is faced with hostile witnesses. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). The fact that McCord may have a difficult time proving his case, however, is not relevant; it is the litigant's choice whether pursuit of an issue difficult to prove and promising only meager relief is justified.

While I am in total agreement with Judge Tamm's able discussion of the underpinnings of a section 1985 action, so that it appears McCord will indeed have his day in court, I would not read his complaint so stringently as to eliminate a potential torts claims. Nor do I believe collateral estoppel is or should be the barrier erected by the majority. I concur therefore in the remand of this case for further proceedings, but would not so circumscribe the scope of those proceedings as has the majority.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES W. McCORD, JR.,	)	
	)	
Plaintiff	)	Civil Action
	)	
v.	)	No.
	)	74-1888
F. LEE BAILEY, et al.,	)	
	)	
Defendants	)	

OPINION

This is a civil action for damages brought by James McCord alleging malpractice against individual lawyers and their firm during his representation in the January 1973 Watergate burglary trial in this court. The plaintiff, James McCord, was convicted in that trial. Defendants are Gerald Alch (the attorney who represented him in the trial), F. Lee Bailey, with whom Mr. Alch was associated in the practice of law at the time, and the firm of Bailey, Alch & Gillis. The matter is before the Court on Cross-Motions for Summary Judgment.

James McCord was one of five persons arrested by police on June 17, 1972 while engaged in a burglary of the offices of the Democratic National Committee in the Watergate complex in Washington, D.C. In his possession and control were documents unlawfully removed from the files of the Democratic National Committee, burglary tools, and elec-

tronic wiretapping and eavesdropping devices.

On or about July 1, 1972 plaintiff McCord retained Alch to represent him in the criminal proceedings arising from the break-in. After a trial in the District Court in January, 1973, McCord was convicted by a jury on eight felony counts. The United States Court of Appeals for the District of Columbia, with McCord represented by other counsel, unanimously affirmed the conviction *en banc* and the Supreme Court denied certiorari. *United States v. McCord,* 509 F.2d 334 (D.C.Cir. 1974); 421 U.S. 930 (1975).

In his complaint filed December 27, 1974 plaintiff complains of allegedly negligent and disloyal conduct. He specifically alleges that 1) defendants negligently and carelessly represent him, 2) these acts were committed willfully, 3) there was a conspiracy among defendants and other attorneys, individual and corporate persons and public officials to commit the acts complained of, 4) the conspiracy deterred McCord from testifying in grand jury proceedings, thus obstructing justice, and 5) defendants caused him to be denied equal protection of the Constitution and the laws of the United States.

After extensive discovery, the defendants filed motions for summary judgment on November 28, 1977. The plaintiff filed a cross-motion for partial summary judgment on January 6, 1978.

Plaintiff is prevented from raising these contentions by the doctrine of collateral estoppel. This doctrine precludes a second or repeated litigation of matters already judicially determined and has at its essence the requirement that some question of fact pending in a current dispute has been finally determined by a court of competent jurisdiction in another suit. *See generally, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313 (1971); *Laughlin v. United States,* 344 F.2d 187 (D.C. Cir. 1975).

In *United States v. McCord, supra,* the United States Court of Appeals for the District of Columbia Circuit found that Mr. McCord had not been denied effective assistance of counsel. For purposes of argument and decision the Court accepted as true all of McCord's factual allegations concerning his counsel's asserted disloyalty. The Court concluded that "[i]t is apparent that these allegations taken as true do not make a case for disloyalty or conflict of interest." Thus, McCord's claims were actually litigated; as stated above, the Court accepted the factual allegations and found them insufficient to support a claim of ineffective assistance of counsel. 509 F.2d at 352 and n. 65,66. Those claims arise here in a similar context. It is well established that the doctrine of collateral estoppel applies where the prior adjudication was at the appellate level. *Goodrich v. Supreme Court of State of South Dakota,* 511 F.2d 316 (8th Cir. 1975); *Thistlethwaite v. City of New York,* 497 F.2d 339 (2d Cir. 1974); *Rosenberg v. Martin,* 478 F.2d 520 (2d Cir. 973); *Williams v. United States,* 334 F.Supp. 669 (S.D.N.Y. 1971).

Plaintiff contends that collateral estoppel does not apply in this case since privity does not exist between the defendants here and the government in the previous McCord case. The privity concept merely requires that the party against whom a previous judgment is asserted must have been a party to, or in privity with, a party to that previous judgment. It is no longer required for purposes of mutuality that the party seeking to use the prior adjudication must also have been bound by it. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra; Hawaiian Paradise Park Corporation v. Becker,* 314 F.Supp. 1133 (D.D.C. 1970); *Lober v. Moore,* 417 F.2d 714 (D.C.Cir. 1969); *Anderson, et al. v. Hill, et al.,* Civil No. 629-76 (Sup. Ct. D.C. March 20, 1978).

Prior to the Supreme Court decision in *Blonder-Tongue* in 1971, the United States Court of Appeals for the District of Columbia stated in *Lober*:

> . . .the rule of mutuality which has frequently appeared as something of an obstacle elsewhere, is not embedded in the decisions of this court. On the contrary, without so much as a hint that mutuality was a problem, we have sometimes permitted nonparties to judgments to assert their binding effect against those who were parties to it. *Id.* at 717.

It is evident that the defendants properly invoked the doctrine of collateral estoppel in this case. In view of the foregoing, it is not necessary to address further issues raised in this motion. However, the Court notes that plaintiff has not suffered any legal injury and therefore has failed to state a claim upon which relief can be granted. In malpractice, as in other actions for breach of duty or obligation, a plaintiff must establish a causal relationship between the alleged wrong and a legally recognizable injury suffered by him. *Becker v. Colonial Parking, Inc.,* 409 F.2d 1130 (D.C. Cir. 1969); *Richardson v. Gregory,* 281 F.2d 626 (D.C.Cir. 1960). In *Niosi v. Aiello,* 69 A.2d 57 (D.C. 1949), the Court of Appeals for the District of Columbia affirmed the trial court's directed verdict for the lawyer-defendant on the ground that regardless of the merit of the malpractice allegations, the earlier negligence action was without merit and could not have produced a recovery for the plaintiff. *Id.* at 61-2. The Court used the following causation test:

> . . .if conduct of an attorney with respect to litigation results in no damage to his client the attorney is not liable. . . In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) the attorney's employment; (2) his neglect of duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client. *Id.* at 60.

With reference to the requirement that negligence caused loss to the client, plaintiff offers only the contention that the "official authorization" defense would have altered the outcome of the trial. In support, plaintiff cites *United States v. Barker,* 546 F.d 940 (D.C.Cir. 1976). McCord claims that he believed that the Watergate break-in was officially sanctioned by the Attorney General, that he relied on such sanction, and that he so informed Mr. Alch. For purposes of these motions only, the defendants do not dispute this allegation. In effect, plaintiff is claiming that he was mistaken in his belief that his conduct was lawful. *Barker, supra,* set out a narrow exception to the general rule that mistake of law is no defense. The *Barker* exception is applicable where the defendant relied on a government official with apparent authority, and such reliance was objectively reasonable under the circumstances. Plaintiff cannot meet the requirement of a reasonably objective belief in this case. The evidence in the McCord case demonstrated that he was not operating under a reasonable belief that the break-in was authorized legitimately for national security purposes. Judge MacKinnon, in affirming plaintiff's conviction, emphasized that plaintiff well knew that he was employed by the Committee to Re-Elect the President and not the government:

> the evidence of appellant's guilty on the offenses he was tried on was so strong and persuasive that none of his arguments, or the additional facts he refers to, would ever cause or justify a different result. Central to this result is my conclusion from all the evidence in the case that it is clear that appellant knew he was working for the Reelection Committee and not for the government. To my mind all his arguments come to naught when that fact is realized.

509 F.2d at 353 (concurring opinion). Since McCord does

not meet the requirements of the Barker exception, it would have been futile to assert the official authorization defense in plaintiff's criminal trial.

Finally, although as stated earlier, it is unnecessary to address any further issues raised in these motions, there is no genuine dispute of material facts in this case. Examination of the pleadings, affidavits, depositions and exhibits reveals that any claims of disputed material facts are unsupported.

Accordingly, the Motions for Summary Judgment filed by defendants, Alch, Bailey, and Bailey, Alch & Gillis are granted and plaintiff McCord's Motion for Partial Summary Judgment is denied.

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United States District Judge

Dated: May 19, 1978

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

JAMES McCORD, JR.,	:	
	:	
Plaintiff	:	
	:	
v.	:	Civil Action
	:	No. 74-1888
F. LEE BAILEY, ET AL.	:	
	:	
Defendants	:	

AMENDED COMPLAINT

[Legal malpractice, Malicious Injury,
Conspiracy, and Deprivation of Rights]

First Count

1. Plaintiff is a citizen of the State of Maryland; Defendants F. Lee Bailey, Gerald Alch, and Colin W. Gillis are citizens of the State of Massachusetts, doing business, as partners or otherwise, under the name of "Bailey, Alch & Gillis." The matter in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000).

2. The jurisdiction of this Court is invested by U.S.C.,

Title 28, § § 1331, 1332 and 1343; the action arises in part under U.S.C., Title 42, § § 1983 and 1985; all as hereinafter more fully appears.

3. At all times herein, Defendant F. Lee Bailey acted individual and as agent, servant and employee of Defendant Alch, Defendant Gillis and Defendant "Bailey, Alch & Gillis."

4. At all times herein, Defendant Gerald Alch acted individually and as agent, servant and employee of Defendant Bailey, Defendant Gillis and Defendant "Bailey, Alch and Gillis."

5. At all times herein, Defendant Colin W. Gillis acted individually and as agent, servant and employee of Defendant Bailey, Defendant Alch and Defendant "Bailey, Alch & Gillis."

6. On or about July 1, 1972, the Plaintiff, under a contractual agreement of employment, entered into an attorney-client relationship with and retained Defendant F. Lee Bailey, Defendant Gerald Alch, Defendant Colin W. Gillis and Defendant "Bailey, Alch & Gillis" to represent him and defend him in the matter of *United States of America vs. James W. McCord, Jr.,* a criminal action in the United States District Court for the District of Columbia, Criminal No. 1827-72, resulting from the so-called "Watergate burglary" for which the Plaintiff had been arrested on June 17, 1972. The charges against the Plaintiff related to the break-in and attempted burglary of the Democratic National Committee offices at the Watergate Complex in the District of Columbia. Plaintiff paid the Defendants or to their agents, servants and employees, the total sum of $25,000 in United States Currency during the period July 1, 1972, through August 1972, and thereafter paid said Defendants, or to their agents, servants and employees, an additional sum of $3,000. The plaintiff had a right to rely

upon, and did so rely upon, Defendants properly and competently to counsel and advise him and to defend the said suit.

7. At all times herein, Plaintiff acted in a careful, non-negligent manner and was free of contributory negligence.

8. The Defendants, among other things, carelessly and negligently represented the Plaintiff in that they revealed confidential communications to third persons; in that they failed to exercise that degree of skill and learning normally applied by attorneys at law who practice in this geographical area; in that they knowingly and intentionally failed or refused to inform the Plaintiff of pertinent facts and factors affecting his legal position, although under a duty to do so; in that they failed to pursue certain avenues of investigation of matters vital to Plaintiff's defense; in that they refused and failed to follow the reasonable and proper requests of the Plaintiff concerning his defense; in that, at all relevant times hereto, the interests of the Defendants were in unrevealed conflict with the interest of the Plaintiff, which adversely affected the proper conduct of his defense; and in that the Defendants' general course of action, turning over to the prosecution and other parties and counsel, information and evidence previously in the possession of the Plaintiff was in derogation of Plaintiff's common law rights and his rights under the Fourth, Fifth, and Sixth Amendments to the United States Constitution, all to his detriment and damage.

9. As a direct and proximate result of the aforesaid and of the Defendant's conduct in failing to exercise ordinary care, by utilizing that degree of skill and learning normally used by attorneys at law who practice in this geographical area, the Plaintiff has been greatly damaged and otherwise injured in that, among other things, the Plaintiff suffered and will continue to suffer; loss of liberty; in that the Plaintiff suffered and will continue to suffer, loss of reputation; in that the

Plaintiff suffered and will continue to suffer, substantial monetary losses; and in that the Plaintiff suffered and will continue to suffer, loss of earnings and earning capacity; all directly and proximately caused by the aforesaid negligence and the intentional omissions and commissions of the said Defendants.

Second Count

10. Plaintiff reaffirms and incorporates herein all relevant allegations in Paragraphs 1 through 9, supra.

11. Defendants and each of them did the acts complained of, and failed to do required acts and fulfill rightful obligations, as specified and otherwise, recklessly, willfully, fully knowing and forseeing the consequential damages to plaintiff, and with intent to injure plaintiff.

Third Count

12. Plaintiff reaffirms and incorporates herein all relevant allegations in Paragraphs 1 through 11, supra.

13. Defendants and each of them conspired with other attorneys, individual and corporate persons, and public officials, to do the acts complained of and to refrain from doing required acts and fulfilling rightful obligations, as specified and otherwise.

Fourth Count

14. Plaintiff reaffirms and incorporates herein all relevant allegations in Paragraphs 1 through 13, supra.

15. Defendants and each of them, in the District of Columbia and elsewhere, singly and in conspiracy with one another and with others, acting in private capacities and

under color of law, deterred Plaintiff from testifying in grand jury and court proceedings; impeded and obstructed the due course of justice in matters affecting Plaintiff; and caused Plaintiff to be denied equal protection of the Constitution and laws of the United States.

WHEREFORE, Plaintiff demands judgment against Defendants jointly and severally in the amount of five million dollars ($5,000,000) in compensatory damages and five million dollars ($5,000,000) in punitive damages, together with interest and costs.

/s/ Rufus King

Rufus King
808 Woodward Bldg.
Washington, DC 20005
(202) 638-4117
Attorney for Plaintiff

/s/ Rufus King, III

Rufus King,
Of counsel

JURY DEMAND

Plaintiff reaffirms his demand for a jury trial on all issues therein.

/s/ Rufus King

Rufus King

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	NO. 78-3612
	)	
v.	)	DC No.
	)	CR-74-364
	)	
PATRICIA CAMPBELL HEARST,	)	OPINION
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding
Argued and submitted March 10, 1980

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON, * District Judge.

CHOY, Circuit Judge:

Hearst appeals the district court's denial, without discovery or a hearing, of her motion for "habeas corpus," 28 U.S.C. § 2255. We affirm in part and vacate in part, and remand for further proceedings.

*The Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

I. *Introduction*

Hearst was arrested in September 1975 for bank robbery. Soon after, she made incriminating statements, which were captured by jail officials on the "Tobin tape," in a jailhouse interview with her friend Tobin. F. Lee Bailey and his associate J. Albert Johnson entered the case on October 2 as Hearst's counsel and prepared a defense based on a coercion theory. They did not move for a change of venue or for a continuance on the ground of pretrial publicity, choosing instead to rely on the voir dire of the prospective jurors. Their motion to suppress the Tobin tape was denied. Trial began in February 1976. Bailey put Hearst on the witness stand; she took the Fifth Amendment in the presence of the jury. Hearst was convicted on March 20. Her motions for a new trial were denied. She took an unsuccessful appeal, and certiorari was denied. 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 91978). Bailey and Johnson were fired, and through present counsel Hearst filed a § 2255 motion, which Judge Orrick denied without a hearing. 466 F. Supp. 1068 (N.D. Cal. 1978). While the appeal from this ruling was pending, President Carter commuted Hearst's sentence.[1]

Most of the above is well known, for Hearst's case was a *cause celebre.* We now know, in addition, that during the course of the proceedings Bailey contracted to write a book about the trial, thus raising questions of potential or actual conflict of interest.

Bailey has admitted by affidavit that

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[1]Although Hearst is no longer in federal custody, this case is not moot. Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973). The district court on remand will have the power under § 2255 to vacate Hearst's conviction, if it finds such relief appropriate.

In February of 1976, I had received several offers to publish a book concerning the Hearst trial. A contract was eventually signed with G.P. Putnam, however, that contract was made contingent upon Ms. Hearst agreeing not to write about her experiences for a period of eighteen months subsequent to the publication. I indicated to Putnam that I would not submit any agreement on this subject to Ms. Hearst while the matter was still being litigated and the contract thus remained contingent upon Ms. Hearst's approval.

On March 22, 1976, Hearst signed the following covenant:

March 22, 1976

Putnam/Berkley Publishing Corp.
New York, New York

Gentlemen:

I understand that F. Lee Bailey is writing a book about my trial and life story as it pertains to the trial for which he will contract with you for publication in the United States and Canada.

As an inducement for you to publish this book, I hereby agree not to publish any account of my experiences in book, magazine, or any other form, prior to 18 months from your initial (hardcover) publication of Mr. Bailey's book, and I further agree to cooperate fully and exclusively with Mr. Bailey in his preparation and writing of the book in any manner he requires.

Very truly yours,

/s/ Patricia C. Hearst

Patricia Campbell Hearst

PCH.sm

Randolph Hearst, appellant's father, declared by affidavit that in September 1975 he discussed with Bailey the possibility of a book, and did not rule out the possibility. Mr. Hearst declared that he did not consider book rights to be part of the fee arrangement for the trial. He declared further that "after . . . trial" Johnson told him that Bailey wanted to write a book about Ms. Hearst's trial, that this would be part of the fee arrangement for the appeal, and that Ms. Hearst would have to sign a covenant not to publish anything for eighteen months after the trial. Mr. Hearst, not knowing that Bailey had negotiated or contracted during the trial to write a book, told Johnson to tell Ms. Hearst that he had no objection to the arrangement Johnson had described.

Ms. Hearst declared by affidavit that before trial Johnson told her that Bailey would write a book about her, that the book rights were part of the fee arrangement her parents had made, that she had to agree to the arrangement but was not to discuss it, and that Johnson would someday ask her to sign a paper relating to it. She further declared that on March 22, two days after her conviction, Johnson brought her the covenant and said, "Remember the paper I would be bringing you to sign one day; well this is it"; that she did not have independent counsel, feel a sense of free will, or understand the effect of the covenant; and that it was never her desire that Bailey write a book about her or the trial.[2]

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[2]Hearst alleged that Bailey's book contract called for a $70,000 advance and a total of $225,000; that the advance was paid; that Bailey had a ghostwriter write "The Trial of Patty Hearst"; and that the publisher rejected the manuscript. Hearst declared by affidavit that on August 1, 1977, Bailey wrote her that since the book had not been published yet, there was no need for the covenant and she could consider it null and void.

II. *Hearst's Contentions*

Hearst makes the following contentions on appeal:

A. Her Sixth Amendment right to the assistance of counsel was violated when Bailey pursued his own interest in publication rights, rather than her interest in acquittal, by (1) failing to seek a continuance; (2) failing to seek a change of venue; (3) putting Hearst on the witness stand; (4) failing to investigate the Tobin tape issue; and (5) failing to investigate the possibility that involuntary ingestion of hallucinogens overcame Hearst's will.

B. Aside from any conflict of interest, Bailey's failure to pursue the defense based on the involuntary ingestion of hallucinogens was incompetence that violated the Sixth Amendment.

C. Aside from any conflict of interest, Bailey's failure to succeed in suppressing the Tobin tape was incompetence that violated the Sixth Amendment.

D. In any event, the Constitution forbade the introduction of the Tobin tape.

E. Because pretrial publicity made a fair trial impossible, the conviction was obtained without due process of law.

We vacate and remand for hearings under § 2255 on contentions (A)(1), (2), and (3). We affirm the district court's other rulings.

A. *Conflict of Interest*

Hearst claims that Bailey's book contract created a conflict of interest that deprived her of her Sixth Amendment right to the assistance of counsel. This alleged conflict was not total, for surely the salability of Bailey's book would have been enhanced had he gained an acquittal for Hearst. Nonetheless, Hearst charges that Bailey (1) failed to seek a continuance, so public interest would not cool and com-

peting authors would not get the jump on him; (2) failed to seek a change of venue, because publicity would be maximized by a trial in San Francisco, a media center and the home of the Hearst family; and (3) put her on the witness stand, so her story would go on the public record and he would not be constrained by the attorney-client confidentiality rules. These decisions prejudiced Hearst, she says, because the came came to trial in the full heat of prejudicial publicity, and she was forced to plead the Fifth forty-two times in the presence of the jury.

The Government and Baily denied that Bailey's book interest played any role in these tactical decisions, and advanced plausible reasons why he made those decisions.

The district court denied relief, on the grounds that counsel's reasonable tactical decisions could not be challenged, and that Hearst had not shown actual prejudice. 466 F. Supp. at 1075-76, 1083, 1087.

We hold that the district court erred in denying Hearst a hearing on these issues.[3] On remand, the district court should conduct a hearing and apply to the facts the law recently laid down by the Supreme Court in *Cuyler v. Sullivan,* ____ U.S. ____ , 48 U.S.L.W. 4517 (1980).

1. *The Cuyler v. Sullivan Test*

In *Cuyler v. Sullivan,* a decision of which the district court did not have the benefit, the Supreme Court considered a claim that retained counsel's conflict of interest violated the client's Sixth Amendment right to the assistance of counsel. Sullivan sought federal habeas corpus relief from a state

[3]Hearst's implausible arguments that Bailey's book conflict hamstrung his investigation of the Tobin tape issue and influenced him not to pursue a defense based on her involuntary ingestion of hallucinogens were not raised below; we will not consider them on appeal.

conviction, whereas Hearst's conviction was federal; Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests. These differences are immaterial. We consider the rules laid down in *Sullivan* to be directly applicable to the present case, and they should govern the case on remand.

The *Sullivan* Court held that counsel's mere potential conflict of interest does not entitle a convict to relief. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 4521. But "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to gain relief." *Id.*

We read *Sullivan* to define an actual, as opposed to a potential, conflict as one which in fact adversely affects the lawyer's performance. But the requirement that the petitioner show this adverse effect is not the same as the requirement of *Cooper v. Fitzharris,* 586 F.2d 1325 (9th Cir. 1978), *cert. denied,* 440 U.S. 974 (1979), that the petitioner show that counsel's incompetent assistance resulted in actual prejudice. For example, overwhelming evidence of guilt might (as in *Cooper* itself) make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance.

2. *Requirement of a Hearing*

When a § 2255 motion is made, "[u]nless the motion and the files and records of the case conclusively show that the

prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." 28 U.S.C. § 2255. The standard is essentially whether the movant has "stated a claim on which relief could be granted," *Moore v. United States,* 571 F.2d 179, 184 (3rd Cir. 1978) — or, where affidavits have been submitted, whether summary judgment for the Government is proper. *See also* Fed. R. Civ. P. 12(b), 56. Under the standard established by the statute and the cases interpreting it, the district court should not have denied Hearst's conflict-based claims without a hearing.

The Ninth Circuit's rule is that "merely conclusionary statements in a § 2255 motion are not enough to require a hearing." *Wagner v. United States,* 418 F.2d 618, 621 (9th Cir. 1969). This does not, however, "mean that the moving party must detail his evidence. It means only that he must make factual allegations, as [movant] has done." *Id.*

On the other hand, in certain cases the "factual allegations" are so "palpably incredible," so "patently frivolous or false," *see Blackledge v. Allison,* 431 U.S. 63, 76 (1977), that it is clear the movant is not entitled to relief or even to a hearing. "The court may appraise a petition by what is reasonably credible." *Cassidy v. United States,* 457 F.2d 813 (9th Cir.) (per curiam), *cert. denied,* 409 U.S. 1026 (1972).

These principles are well illustrated by *Machibroda v. United States,* 368 U.S. 487 (1962). There, the movant's § 2255 motion and affidavit made detailed factual allegations, which were countered by an affidavit introduced by the Government. The district judge concluded without a hearing that the allegations were false, and denied relief. The Supreme Court vacated and remanded, saying,

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial

court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.

We cannot agree with the Government that a hearing in this case would be futile because of the apparent lack of any eyewitnesses to the occurrences alleged . . . ". . . The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." [Citation.]

. . . .

There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. §2255 can be served in this case only by affording the hearing which its provisions require.

Id. at 494-96.

In this case, the district court could not properly rely on the apparent regularity of the record and of Bailey's "tactical" decisions, 466 F. Supp. at 1075, 1083, to "conclusively show" that Hearst was entitled to no relief, because her motion was based on a circumstance, not appearing on the record, that allegedly affected Bailey's judgment. *See Sanders v. United States,* 373 U.S. 1, 19-20 (1963) (hearing must be granted on §2255 claim that apparently regular guilty plea was invalid because defendant was under influence of narcotics). Bailey's potential conflict

of interest is virtually admitted, and Hearst has alleged an actual conflict and adverse effect in sufficient and not implausible detail.

We conclude that Hearst is entitled to a hearing on the truth of her allegations.[4]

3. *Discovery*

Hearst alleged that Bailey was negotiating with publishers before the trial, when certain challenged decisions were made; she offered to prove it through depositions and discovery from Bailey's publisher and its editor-in-chief.

In §2255 cases, "A party may invoke the processes of discovery . . . if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6 (following §2255); *see Argo v. United States,* 473 F.2d 1315, 1317 (9th Cir.), *cert. denied,* 412 U.S. 906 (1973). The district court, because of its belief that Hearst's §2255 motion was

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[4]The Supreme Court has noted that although the standards for disposing without a hearing of habeas corpus petitions by state and federal prisoners are theoretically "exactly commensurate," in practice

> a motion under §2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a §2255 motion, even though he could not similarly dispose of a habeas corpus petition challenging a state conviction but presenting identical allegations. . . . To this extent, the standard may be administered in a somewhat different fashion.

Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977).

Since Judge Orrick's decision to deny a hearing was based on his reading of the trial record, however, not on his personal recollection of the trial, the standard must be administered strictly here. Although Judge Orrick presided at Hearst's sentencing and considered the §2255 motion which is the subject of this appeal, the late Judge Oliver J. Carter presided at Hearst's trial.

meritless, refused to allow Hearst to take discovery under Rule 6. On remand, the district court should again consider the question of discovery.

B. *Ingestion of Drugs — Attorney Incompetence*

The district court correctly found that Hearst had no possibility of demonstrating that Bailey's representation was incompetent to the extent that he failed to investigate fully the possibility that involuntary ingestion of hallucinogens overcame Hearst's will. 466 F. Supp. at 1086-87. The only evidence of this ingestion, besides Hearst's vague assertion that she had experienced drug-type sensations, was a double hearsay account of Donald DeFreeze's unfocused statement of future possibilities.[5] No psychiatric report suggested that hallucinogens had affected Hearst's behavior, and several psychiatrists told Bailey that the symptoms she reported could have been a normal reaction to light after one has been blindfolded. If this drug defense had been unsuccessfully proffered the credibility of Hearst's entire defense might have been destroyed. Bailey acted well within the scope of "reasonably competent and effective representation," *Cooper v. Fitzharris,* 586 F.2d at 1327, when he devoted his energies to other aspects of Hearst's defense. Even in the unlikely event that this decision was a mistake, there was still no constitutional dereliction. *See id.* at 1330.

C. *The Tobin Tape — Attorney Incompetence*

As the district court found, the record demonstrates that Bailey and his co-counsel made satisfactory, if not brilliant,

[5]DeFreeze was a leader of the Symbionese Liberation Army, the group which kidnapped Hearst.

investigation and presentation of the facts and law that might have resulted in the suppression of the Tobin tape. 466 F. Supp. at 1078, 1079 n.17, 1086. Thus the court did not err by ruling, without a hearing, that Hearst could not demonstrate that Bailey's representation on this issue fell below the "reasonably competent and effective" level. *See* 586 F.2d at 1327.

D. *The Tobin Tape — Fourth Amendment*

Hearst claims that the Tobin tape was the fruit of a Fourth Amendment violation and should have been suppressed. The Government provided her a full and fair opportunity to raise this issue on direct appeal; therefore, it cannot be raised on collateral review. *Tisnado v. United States,* 547 F.2d 452, 456 (9th Cir. 1976); *see Stone v. Powell,* 428 U.S. 465, 494 (1976). If the provided opportunity has been squandered due to defense counsel's incompetence or misconduct, a convict's only option on collateral review is a Sixth Amendment claim based on inadequate assistance of counsel. *See Canary v. Bland,* 583 F.2d 887, 890 (6th Cir. 1978). We held in Part II.C, *supra,* that Hearst received adequate assistance of counsel on the Tobin tape issue.

E. *Pretrial Publicity — Due Process*

Hearst claims that the huge amount of prejudicial pretrial publicity made it impossible for her to receive the fair trial guaranteed by the Fifth Amendment's Due Process Clause. Bailey did not make this claim at trial or on direct appeal, nor did he move for a continuance or change of venue to alleviate the problem; instead, he relied on the voir dire to obtain unbiased jurors. The § 2255 court held that this constituted a waiver of Hearst's due process/fair trial objection, and that no "cause" was alleged or " prejudice" shown, *see Wain-*

wright v. Sykes, 433 U.S. 72 (1977), to justify permitting the waived objection to be litigated collaterally. 466 F. Supp. at 1073-76.

In federal criminal cases, all defenses and objections based on defects in the institution of the prosecution or non-jurisdictional defects in the indictment or information must be raised before trial, or else are waived (although "the court for cause shown may grant relief from the waiver"). Fed. R. Crim. P. 12(b)(1)-(2), (f). A waived challenge of the grand jury cannot be litigated collaterally. *Davis v. United States,* 411 U.S. 233, 242 (1973). Challenges of the petit jury are treated the same as challenges of the grand jury. *Shotwell Manufacturing Co. v. United States,* 371 U.S. 341, 362 (1963). It follows that Hearst's due process/fair trial objection was waived.

Although Hearst did not explicitly identify Bailey's conflict of interest as the "cause" for the waiver, her allegations that this conflict induced Bailey to fail to move for a continuance or a change of venue sufficiently raised a claim of *Sykes* and Rule 12(f) "cause" before the § 2255 district court. But we note that Hearst's allegations in contentions (A)(1) and (2), that Bailey's failure to make these motions violated her Sixth Amendment rights, are substantively identical to her allegation of "cause." If she can establish actual conflict of interest and a Sixth Amendment violation, she establishes "cause"; by the same token, she cannot show "cause" without showing an actual conflict.

Once Hearst established an actual conflict of interest with adverse effect on her counsel's performance, she would be entitled to relief on contentions (A)(1) and (2) even if no prejudice to her chance of acquittal at trial appeared. Therefore, if Hearst is entitled to relief on contentions (A)(1)

and (2) she will gain the relief she seeks through contention (E); yet if she is not entitled to relief on the former contentions, she could not be entitled to relief on the latter contention (because she would not have established "cause"). Since the district court's decision on contentions (A)(1) and (2), which we have remanded for a hearing, will effectively moot contention (E), we see no reason to disturb the district court's decision on that issue.

III. *Attorney Discipline*

A. *Standards of Conduct*

Under Federal Rule of Appellate Procedure 46, a Court of Appeals can discipline any attorney who practices before it for "conducting unbecoming a member of the bar." *See In re Chandler,* 450 F.2d 813 (9th Cir. 1971). This language is not unconstitutionally vague. It refers to the legal profession's "code of behavior" and "lore," of which all attorneys are charged with knowledge and of which the American Bar Association Code of Professional Responsibility (ABA CPR) is an illustration. *In re Bithoney,* 486 F.2d 319, 324 & n.7 (5th Cir. 1973). In addition, members *pro hac vice* of the bar of the United States District Court for the Northern District of California are charged with knowledge of the disciplinary rules of the State Bar of California, as well as those of their home jurisdiction.

B. *Bailey's Conduct*

The allegations and admissions in the record of the present case raise serious questions as to whether Bailey and, to the extent of his participation, Johnson have been guilty of conduct unbecoming members of the bar.

1. *The Book Contract*

Bailey's book contract created a potential conflict of interest; this case tests whether it ripened into an actual conflict of interest. Therefore, Bailey may have violated ABA CPR Disciplinary Rule 5-101(A), which reads:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The obvious reason for this rule is well expressed in ABA CPR Ethical Consideration 5-1:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Bailey's book contract might not fall within ABA CPR Disciplinary Rule 5-104(b), *see infra,* because the contract itself was not an acquisition *from the client* of an interest in publication rights. Nonetheless, Rule 5-104(B) recognizes the dangers inherent in simultaneous lawyering and

authoring.[6] Moreover, all courts before which the issue has been raised have disapproved the practice of attorneys arranging to benefit from the publication of their clients' stories. *See Ray v. Rose,* 491 F.2d 285, 289 (6th Cir.), *cert. denied,* 417 U.S. 936 (1974); *Ray v. Rose,* 535 F.2d 966, 974 (6th Cir.), *cert. denied,* 429 U.S. 1026 (1976); *Wojtowicz v. United States,* 550 F.2d 786, 793 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977); *People v. Corona,* 80 Cal. App. 3d 684, 720-21, 727, 145 Cal. Rptr. 894, 915-16, 920 (1978); *Maxwell v. Superior Court,* 101 Cal. App. 3d 341, ____, ____, ____, 161 Cal. Rptr. 849, 854-56, 861 (1980).

In light of Rule 5-101(A), Bailey's decision to enter into a book contract during the course of the trial was most unfortunate. Potential and actual conflicts of interest always bring disrepute upon the bar, the court, and the law. They do so to an even greater degree when the case is a *cause celebre*

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[6]This recognition becomes even more explicit in Rule 1.9(d) of the Discussion Draft of the ABA Model Rules of Professional Conduct, *reprinted in* 48 U.S.L.W., No. 32, at 8 (Feb. 19, 1980):

> Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary rights to a matter arising from the representation.

The Comment to that proposed Rule reads in part:

> An agreement by which a lawyer acquires literary rights concerning the subject matter of the representation involves incompatible standards for the lawyer's performance, one being effectiveness in representing the client and the other being performance that has literary value. Even after conclusion of representation, a lawyer may make use of information about a client in an account of professional experience only to the extent permitted by Rule 1.7.

The proposed Rule, if in effect at the time, would explicitly have prohibited Bailey's book contract.

and the attorney has the reputation of being an outstanding lawyer. Moreover, Bailey is in no position to claim that the book contract was necessary to finance his fee.

2. *The Covenant*

ABA CPR Disciplinary Rule 5-104(B) reads:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Even though Bailey's book contract itself technically might not violate this Rule, Hearst's March 22 covenant to cooperate exclusively with Bailey and not to publish on her own was obtained pursuant to his representation and, we believe, constituted an "interest in publication rights." Although Hearst's trial had ended on March 22, Bailey's representation of Hearst had not. He continued to represent her through a motion for new trial, a second motion for new trial, sentencing, a direct appeal to this Court, a petition for rehearing en banc, a petition for certiorari, a motion to vacate a concurrent sentence, and a Rule 35 motion to reduce sentence. Thus, Bailey was apparently in violation of ABA CPR Disciplinary Rule 5-104(B) from March 22, 1976, onward.

3. *The Fraud on the Client*

Bailey admits the book contract; the covenant is in the record. The allegations suggesting fraud are not so well established. However, if proved, they would tend to show that Bailey and Johnson misled Randolph Hearst and appellant regarding the finality of the agreement for a book,

the subject of the book, the duration of the covenant, the application of the proceeds, and appellant's obligation to sign the covenant. The allegations regarding the background, manner and timing of the presentation of the covenant to appellant for signing indicate overreacing.

If all this is true, Bailey and Johnson may have violated ABA CPR Disciplinary Rule 1-102(A)(4):

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Other Disciplinary Rules might also be involved. Attention shoul also be directed to California Rule of Professional Conduct 5-101:

> A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

C. *Disciplinary Proceedings*

We suggest that the district court, on remand, might find it advisable to issue to Bailey (and perhaps to Johnson as well) an order to show cause why he should not be disciplined, on the grounds noted above, in his capacity as a member *pro hac vice* of the bar of the United States District Court for the Northern District of California.[7]

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[7]We choose not, at this time, to issue to Bailey an order to show cause why he should not be disciplined by the United States Court of Appeals for the Ninth Circuit. We will await the findings made in the district court's disciplinary proceedings, and do what appears necessary thereafter.

IV. *Conclusion*

As to Hearst's contentions that Bailey suffered from an actual conflict of interest that adversely affected his performance, in that it caused him to fail to seek a continuance, to fail to seek a change of venue, and to put Hearst on the witness stand, the district court's denial of the motion for relief is VACATED, and the case REMANDED for reconsideration of Hearst's discovery request, and for a hearing.

As to all other matters, the judgment of the district court is AFFIRMED.

No. 80-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES W. McCORD, JR.,
Petitioner,

v.

F. LEE BAILEY, GERALD ALCH,
BAILEY, ALCH AND GILLIS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a party who has received full and fair consideration of his claim by a court in a summary judgment-type proceeding may properly be collaterally estopped from relitigating that claim in another proceeding?

2. Whether the Supreme Court should define a uniform standard for the tort of attorney malpractice and whether it should review the Court of Appeals interpretation of the local District of Columbia standard?

3. Whether the district court's termination of discovery presents a federal question worthy of review where an abuse of discretion was not claimed and where the ruling was proper?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is not yet reported.

JURISDICTION

Petitioner filed for a writ of certiorari on January 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In January, 1973, petitioner James W. McCord, Jr., was convicted of eight felony counts arising from his participation in the Watergate burglary. McCord at-

tacked his conviction both in a *coram nobis* petition and on direct appeal, alleging, *inter alia*, that his Sixth Amendment right to the effective assistance of counsel had been violated. The Court of Appeals, sitting *en banc*, accepted as true all of McCord's material allegations but rejected McCord's claims as without merit. *United States* v. *McCord*, 509 F.2d 334, 352 (D.C. Cir. 1974) (*en banc*), *cert. denied*, 421 U.S. 930 (1975).

On August 1, 1975, McCord filed the amended complaint in this case, making factual allegations virtually identical to those made in his appeal from his conviction but recast as civil causes of action for intentional and negligent malpractice, conspiracy and civil rights violations. *McCord* v. *Bailey*, No. 79-1085, slip op. at 5 (D.C. Cir., Sept. 9, 1980), Pet. App. 4a. After over two years of discovery, in February, 1978, the trial court dismissed all of McCord's claims by summary judgment.

The Court of Appeals affirmed the district court as to all but one of McCord's claims. *Id.*, Pet. App. 1a-31a.[1] The Court of Appeals recognized and McCord admitted that "no . . . material contentions" were raised in the civil suit which had not been heard and rejected in the criminal proceedings. *Id.* at 5, Pet. App. 4a. Since McCord had already been afforded a full and fair opportunity to litigate his claims of misconduct by his counsel, the Court of Appeals held that he had properly been precluded from relitigating them. *Id.* at 7-8, Pet. App. 6a-7a.

The Court of Appeals affirmed on the alternative ground that McCord could not demonstrate the existence of an essential element of his alleged torts—causally-related injury. McCord's claims of misconduct by his attorneys reduced to his assertion that his lawyers failed

[1] That claim was based on a provision of the Civil Rights Act of 1871, 42 U.S.C. § 1985(2), and is the basis of a cross-petition for a writ of certiorari in case number 80-1168.

to raise a defense which could have caused his acquittal; since the Court of Appeals reasoned that the defense was not available to McCord on the basis of the facts alleged, no injury followed from not raising the defense. *Id.* at 11, Pet. App. 10a.

REASONS FOR DENYING THE WRIT

1. The holding of the Court of Appeals on collateral estoppel accords with the decided cases and does not present an important federal question.

Petitioner McCord seeks review of the holding below that he is collaterally estopped from relitigating his malpractice claims, arguing merely that the court below erred in applying the doctrine against him, because in neither of the two prior proceedings in which his allegations of attorney misconduct were decided was he afforded an evidentiary hearing. Nowhere, however, in McCord's petition does he identify any "special and important reasons" why certiorari should be granted as to this (or any other) question presented. *See* Rules of the Supreme Court, Rule 17.

McCord claims that collateral estoppel should not have been applied in his case, because he was never afforded a "full and fair opportunity to prove a claim" [2] of attorney misconduct during the criminal proceedings. He argues that the Seventh Amendment requires that he be afforded a jury trial on the same allegations that the Court of Appeals, in the criminal proceedings, assumed to be true but rejected as legally insufficient to establish misconduct by McCord's attorneys. But this Court has noted: "No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined." *In re Peterson*, 253 U.S. 300, 310 (1920). Here, no such facts exist because McCord's

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[2] *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 324-25 (1971).

allegations were accepted as true in the prior adjudication and found wanting to support a claim.[3]

Collateral estoppel applies to findings made in a nonplenary proceeding, including summary judgment.[4] Thus, no question worthy of the writ is presented by the application of the doctrine to contentions made in a civil case when those same contentions, accepted as true, were rejected as legally insufficient in a prior criminal proceeding.[5] Moreover, since the court below rested its decision on alternative state law grounds (*see* discussion § 2, *infra*), the claimed federal question presented by McCord does not even need to be decided.

2. The second and third questions proffered by petitioner involve only the state law matter of the appropriate standard for malpractice liability.

McCord asks this Court to grant his petition to review the relationship between the standards for mal-

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[3] In effect, McCord does no more than contest summary judgment procedure as inconsistent with the Seventh Amendment, an argument rejected by this Court long ago. *Fidelity & Deposit Co.* v. *United States*, 187 U.S. 315, 319-21 (1902).

[4] *See, e.g., Jackson* v. *Hayakawa*, 605 F.2d 1121 (9th Cir. 1979); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 110 (5th Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Hubicki* v. *A.C.F. Industries Inc.*, 484 F.2d 519 (3d Cir. 1973); *Lauchlin* v. *United States*, 444 F.2d 1037 (7th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972); *In re Falstaff Brewing Corp. Anti-Trust Litigation*, 441 F. Supp. 62 (E.D. Mo. 1978); *Neeld* v. *National Hockey League*, 439 F. Supp. 446 (W.D.N.Y. 1977).

[5] The dissent in the court below argues that collateral estoppel should not necessarily apply in this case only because there is an "unusual combination of circumstances" present. *McCord* v. *Bailey*, slip op. at 5-6, Pet. App. 28a-29a (Wald, J., concurring in part, dissenting in part.) That a decision "turns on its own facts" is itself a sufficient ground for denying certiorari since the time of the Court is ill-spent in cases of limited applicability.

practice liability and the Sixth Amendment right to the effective assistance of counsel and to review a purported holding that a criminal conviction bars a subsequent civil suit for malpractice. Petitioner's questions, however, suffer the fatal defect that they raise no federal question. As this Court has recently indicated:

> [The Supreme Court is] not concerned with the elements of a state cause for action for malpractice . . . . For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law . . . .

Ferri v. *Ackerman*, 444 U.S. 193, 62 L. Ed. 2d. 355, 359-60 (1979). Just as a state is free to define defenses to a malpractice claim, it is free to define the claim itself. Since McCord has failed to demonstrate, or even allege, any "conflict with federal law," the writ should be denied.[6]

3. The district court's discovery ruling does not present an imporant federal question and, in any event, was correct.

McCord contends that a procedural ruling of the district court, terminating discovery for both sides over two years after the complaint was filed, should be reviewed. However, the propriety of such a ruling hardly con-

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[6] Indeed, a recent rules amendment reflects the Court's apparent disinterest in reviewing such decisions even in otherwise appropriate cases. *See* Stern & Gressman, "Supreme Court Rules, The 1980 Revisions," 27 CRIM. L. REP. 4109, at 4116 (July 2, 1980):

> . . . Rule 17 omits one item that was set forth in former Rule 19—a federal court of appeals decision that resolves "an important state or territorial question in a way in conflict with applicable state or territorial law." The omission doubtless reflects the Court's lack of interest in reviewing diversity cases where the only issue is an alleged conflict with applicable state law.

stitutes an important federal question, particularly where no abuse of discretion by the trial judge or prejudice to litigants is claimed; appellate review of discovery rulings is routinely declined where these factors are not present. *See, e.g., Admiral Treatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 898-99 (8th Cir. 1978). *See also* 28 U.S.C. § 2111 ("On the hearing . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.")

The discovery ruling was, moreover, a proper one.[7] It occurred after ample time for discovery had passed (Pet. App. 3a), it was made well in advance of its cut-off date (giving parties ample time to complete discovery), and it served the salutary purpose of creating an opportunity for the filing of dispositive summary judgment motions. Indeed, petitioner McCord himself filed a summary judgment motion as to liability, confirming that he believed his discovery to be complete.

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[7] This Court has recently observed that "judges should not hesitate to exercise appropriate control over the discovery process." *Herbert* v. *Lando*, 441 U.S. 153, 99 S. Ct. 1635, 1649 (1979).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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